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No. 94-865

In the

Supreme Court of the United States

October Term, 1994

Rütgerswerke AG,

Petitioner,

v.

Kay Bettis, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR THE FEDERAL REPUBLIC OF GERMANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Federal Republic of Germany ("Federal Republic") hereby moves for leave to file a brief as *amicus curiae* in support of petitioner Rütgerswerke AG pursuant to Sup. Ct. R. 37.2. The consent of the petitioner has been filed with the Clerk of this Court. Respondents Kay Bettis, *et al.*, have refused their consent to the filing of this *amicus curiae* brief. Attached as Exhibit A are the Federal Republic's letter to respondents and respondents' response declining its "invitation to consent" to the filing of this brief.

In 1978 this Court directed the Clerk of this Court to request the U.S. Department of State to inform foreign governments to make their views known to the Court in any case in which they have an interest by filing *amicus* briefs. In a circular diplomatic note dated August 17, 1978, the U.S. Department of State advised all Chiefs of Mission in Washington that

> The United States will consent to such a[n amicus] filing in any case in which it is a party. *In the unlikely event that any other party should decline consent, the Supreme Court will almost certainly grant the motion of a foreign government for leave to file a brief.* (emphasis added).[1]

Respondents' refusal to consent to the Federal Republic's presentation of its views to the Court lacks any justification. The Federal Republic respectfully requests permission to file this brief so that the Court may have the benefit of the Federal Republic's views on the interpretation of this important multilateral treaty dealing with international judicial assistance to which the Federal Republic and the United States of America are parties. The Federal Republic believes that it is in a strong position to comment on the issues tendered to the Court in the petition.

INTEREST OF THE AMICUS CURIAE

The Federal Republic is a member of the Hague Conference on Private International Law and actively participated in the negotiation of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (the "Evidence Convention" or "Convention"). The Federal Republic ratified the Convention on April 27, 1979, and the Convention is now in force between the Federal Republic and 24 states, including the United States of America. The signatories agreed in this Convention on the methods to be

[1] *Reprinted* in 73 Am. J. Int'l L. 124 (1979).

used in complying with requests for legal assistance to take evidence abroad recognizing the differences between the legal systems of the common law and civil law nations. The Federal Republic has a vital interest in the implementation of the Convention by other member states. It views with grave concern the manner in which the obligations undertaken by the United States under the Convention have been misinterpreted by the courts of the United States as a result of this Court's majority decision in *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522 (1987) (hereinafter "*Aerospatiale*").

This Court alone has the authority and competence to foster the noble experiment embodied in the Evidence Convention. In a world where the flow of capital, goods and services transcends national borders and transnational litigtion has become commonplace, the states following the common law must find means to bridge the differences between their legal institutions and the civil tradition.

STATEMENT OF FACTS

Invoking the district court's federal question and diversity jurisdiction, the respondents brought a class action suit against petitioner's wholly-owned subsidiary, Ruetgers-Nease Chemical Co., Inc. ("Ruetgers-Nease") and one of Ruetgers-Nease's predecessor companies, Nease Chemical Co., Inc. ("Nease"). The original complaint sought compensation for environmental damage claimed to have been caused to respondents' properties abutting a plant site now owned by Ruetgers-Nease in Salem, Ohio. Plaintiffs subsequently added petitioner, as Ruetgers-Nease's corporate parent, as a defendant, and in their second amended and supplemental complaint respondents asserted claims against petitioner for $100 million dollars on respondeat superior and alter ego theories. Petitioner, Rütgerswerke AG, is a German corporation with its principal place of business in Germany and did not own the plant site that caused the alleged environmental damage at the

time. Petitioner acquired the properties of Nease and incorporated its subsidiary Ruetgers-Nease long after the plant causing the claimed environmental damage was closed.

Shortly after petitioner was joined to the action, respondents served on the petitioner their first discovery requests: 35 interrogatories, 43 document requests and a notice to depose a retired member of petitioner's board who resided in Germany. The discovery was stayed by the designated Magistrate Judge pending a ruling by the district court on petitioner's challenge to the court's personal jurisdiction over it.[2] In January 1992, while the stay was in effect, respondents served on petitioner a revised document request, almost trebling the number of categories of documents demanded (to 117). Some four months later, respondents served a third version of their document request, increasing the number of documents sought to 134 and a revised set of interrogatories numbering 49.

On three occasions petitioner sought protective orders from the Magistrate Judge supervising the discovery, and asked that respondents be required to employ the machinery of the Evidence Convention to obtain the information from Germany. The Magistrate Judge declined to enter such an order and directed that discovery proceed under the Federal Rules, stating that the question of the reasonableness of particular discovery requests would be addressed "if and/or when a motion to compel came for ruling the parameters [*sic*] of the discovery to be allowed." (Magistrate Judge's Memorandum Opinion and Order, May 6, 1994, Pet. App. at B-1). With only a passing reference to the Evidence Convention and the three-prong balancing test established by the *Aerospatiale* Court, the Magistrate Judge ruled that "the Federal Rules of Civil Procedure provide the preferable mode of discovery

[2]The district court subsequently denied petitioner's motion to dismiss the suit against it for lack of personal jurisdiction, but noted that plaintiffs had made out only a *prima facie* case for jurisdiction and will bear the burden of proof on this issue at trial.

herein," based on "the nature of the claim asserted . . . and the nature of the evidence which the [respondents] must adduce to establish their claim." (*Id.* at B-2).

The district court denied petitioner's appeal from the Magistrate Judge's Order.

> The Defendant correctly asserted that the Magistrate Judge did not use all the *Societe* criteria. However, modification of the Magistrate Judge's order is not necessary as long as it is not clearly erroneous or contrary to law.

Pet. App. at B-6.

Petitioner's application to the court below for a writ of mandamus was denied. The Court of Appeals ruled in relevant part —

> In the instant case, the law is clear that the terms of the Hague Convention on the Taking of Evidence are optional. [citing *Aerospatiale.*] The Supreme Court has not articulated specific guidelines for the application of the Hague Convention, but has indicated that the trial court must determine in each case based on the factors present in that case whether discovery against a foreign party shall proceed under the Hague Convention or the federal civil rules . . . The district court has made that determination in the instant case, and Rütgerswerke's petition does not establish a clear and indisputable right to relief in mandamus as a result of the district court's decision.

Pet. App. at A-2.

SUMMARY OF ARGUMENT

I.

In the view of the Federal Republic, the guidelines established by *Aerospatiale* have not had the intended effect of requiring the lower courts to balance the various interests and should be reexamined by the Court. The majority of this Court ruled in *Aerospatiale* that the Evidence Convention does not provide the exclusive or mandatory procedures for obtaining evidence physically located in the territory of other member states. It further held that international comity does not require that U.S. courts first resort to the Convention's procedures before allowing discovery under the Federal Rules. The majority, however, set out specific guidelines to be followed by lower courts in determining whether to resort to the Convention: to scrutinize the particular facts in each case, the sovereign interests of the state in whose territory the evidence is to be gathered, and the likelihood that such resort will prove effective. The Federal Republic's sovereign interest includes its interest in judicial sovereignty and the sphere of privacy guaranteed by its Constitution and domestic laws.

The practical results of the majority's decision can now be discerned through an analysis of the cases that have applied the Court's approach. To *amicus'* knowledge, of the fourteen cases that have been reported to date, only three have shown regard for the sovereign's interests in foreign court-ordered discovery on its own soil; the remaining cases have uniformly demonstrated hostility toward the Convention.[3] Those cases fail properly to address the issue of the foreign state's sovereign interest and improperly avoid use of the Convention by placing the burden of proof on the proponent of the Convention procedures. The instant case follows this improper practice and should be reversed.

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[3]The cases are summarized, *infra*, at pp. 10 et seq.

For these reasons, *Aerospatiale* should be reconsidered and its guidelines clarified to assure that a foreign state's sovereign interests are addressed and given appropriate weight, and that the burden of proof not be placed on the proponent of the use of the Convention.

II.

The 1993 Amendments to the Federal Rules add the requirement that discovery be provided without demand. These amendments can be adopted in full or in part by the district courts. Forum-shopping to the deteriment of foreign litigants will result. For this additional reason, the procedures of the Convention should be preferred.

III.

The Federal Republic subscribes to the original intent of the Convention, which was to devise a system that was both "tolerable" in the State of execution and "utilizable" in the forum where the action was pending. The Federal Republic cannot view the matter as tolerable when a U.S. court compels a party to give evidence within its territory that violates its laws. The theory proffered to justify this practice, that judicial jurisdiction over evidence is determined not by location of the evidence but by personal jurisdiction over a party with control over the evidence, does not comport with the Convention. In any event, absent resort to the Convention, the United States lacks the consent of the Federal Republic to compel activities within its borders.

ARGUMENT

I. AMICUS RESPECTFULLY URGES THE COURT TO REEXAMINE THE MAJORITY'S HOLDING IN AEROSPATIALE, SINCE EXPERIENCE NOW TEACHES THAT THE MAJORITY'S GUIDELINES ARE INADEQUATE AND AS A RESULT THE LOWER COURTS DO NOT PROPERLY BALANCE THE INTERESTS OF THE LITIGANTS AND THE FOREIGN GOVERNMENTS.

A. *Aerospatiale* Requires That In Making Discovery Rulings Courts Consider The Foreign State's General Sovereign Interest, Which, In Germany's Case, Includes Reserving The Taking Of Evidence To Judicial Authorities And Showing Greater Respect For Confidentiality Than Is The Case In The United States

The *Aerospatiale* Court's instructions to lower courts bear repeating:

> American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. Judicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests. In addition, we have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation. See *Hilton v. Guyot*, 159 U.S. 113 (1895). American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state.

482 U.S. at 546.

While the *Aerospatiale* Court rejected the argument that comity required first use of the Convention, the Court nevertheless stated:

> Moreover, the concept of international comity requires in this context a more particularized analysis of the respective interests of the foreign nation and the requesting nation than petitioners' proposed general rule would generate. We therefore decline to hold as a blanket matter that comity requires resort to Hague Evidence Convention procedures without prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to those procedures will prove effective.

482 U.S. at 543-544, footnotes omitted.

The Federal Republic understands these instructions to mean that the courts must consider a foreign state's general sovereign interest, that is, its interest in protecting its judicial sovereignty and preserving the societal values embodied in its laws, and not just the interests of the parties to a particular litigation. The protection provided by the laws of the Federal Republic to personal privacy and business confidentiality is evidenced by the deeply rooted practice of reserving the taking of all evidence to judicial authorities. Three particular aspects of German procedure ensure that the judge, in exercising this authority, will not intrude on the constitutionally protected interests of the parties. First, German courts will not permit the taking of evidence that is not designed to "*prov[e]* plausible facts, but is rather designed to *produce* such facts."[4] Second, among the Constitutional and statutory privileges recognized by German law is the right to decline to testify about business secrets, professional confidences,

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[4]Heck, *Federal Republic of Germany and the EEC*, 18 Int'l Law. 793, 794 n. 25 (1984).

and matters that might implicate the rights of strangers to the proceedings. Third, German law narrowly circumscribes the occasions when a German court will compel the disclosure of documents. The ultimate source of the limits imposed on the scope of evidence taking is the German Constitutional principle of proportionality which mandates that "'the witness' sphere of privacy and other personal rights guaranteed under Art. 2, para. 1 together with Art. 1, para. 1 of the Basic Law [the Federal Constitution] may not be abridged by procedural law and its application by parties to a proceeding." 38 BVerfGE [Decisions of the Federal Constitutional Court] 105, 114 (1975).

B. Experience Teaches That Lower Federal And State Courts Do Not Respect The General Sovereign Interest of Foreign States And Improperly Place On The Foreign Litigant The Burden Of Showing That The Procedures Of The Convention Should Be Used.

Most of the reported post-*Aerospatiale* cases involving German defendants have given little or no weight to the Federal Republic's general sovereign interests. Thus, in *Haynes v. Kleinwefers & Lembo Corp.*,[5] the district court made no mention of the Federal Republic's sovereign concerns.[6] In *Scarminach v. Goldwell GmbH*,[7] a New York State court demanded that the German manufacturer show how a "specific" sovereign interest of the Federal Republic was implicated.[8]

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[5]119 F.R.D. 335 (E.D.N.Y. 1988)

[6]The court in *Kleinwefers, supra*, found that the interrogatories and production requests were not burdensome and denied Kleinwefers' motions that discovery be conducted under the Convention. *Kleinwefers, supra*, at 338-339.

[7]531 N.Y.S. 2d 188 (Sup. Ct. N.Y. 1988).

[8]The court concluded that the Convention did not preclude use of New York's discovery provisions. The court imposed on the German manufacturer, Goldwell, the burden of proof to show that resort to Convention

And in *Doster v. Carl Schenk A.G.*,[9] another district court required the German manufacturer to show how the "specific" discovery compromised German sovereign interests.[10] A New Jersey state court in *Moake v. Source Intl. Corp.*,[11] found no evidence in the record that the discovery requests would "generally" violate German sovereignty or that the Convention procedures would be a "more effective" means of obtaining the information.[12]

We wish to point out to the Court that requests for assistance to the United States from Germany outnumber requests from the United States to Germany by a factor of almost eight to one. See n. 28, *infra*. However, to our knowledge, there is no reported case where a German court has ordered a litigant to disregard U.S. judicial sovereignty or required a U.S. entity doing business in Germany to violate U.S. law by ordering that evidence be taken in accordance with the German law of procedure.

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procedures should be required. According to the court, Goldwell had failed to show how the discovery sought by plaintiff implicated a specific sovereign interest of West Germany. *Id.* at 190-191.

[9]141 F.R.D. 50 (M.D.N.C. 1991).

[10]The district court held in *Schenk, supra*, that the proponent of the Convention was in the better position to have the knowledge of any special sovereign interest and the benefits versus the problems of foreign discovery procedures. Without a showing of such interests or benefits, there was no reason why a U.S. court should compel a plaintiff to use the less liberal discovery procedures of a foreign country, thereby creating an unequal situation without good cause. *Id.*, at 51, n. 3.

[11]634 A.2d 263 (N.J.Super.App.Div. 1993).

[12]*Moake, supra*, at 461. The court reasoned (1) that it would create an inequitable asymmetry if the domestic party was required to answer interrogatories under local rules while a foreign party from a Convention state could take advantage of the more onerous provisions of the Convention, (2) that *Aerospatiale* did not interpret comity to subordinate the interests of American courts to a foreign nation whenever a discovery conflict arose, and (3) that the record contained no proof that the discovery generally would violate the sovereignty of the Federal Republic or that the Convention procedures would be more effective. *Moake, supra*, at 457-460.

In contrast, only two reported cases involving German defendants have required first use of the Convention. Both of these cases favored the *Aerospatiale* minority opinion over the majority opinion. The first case was *Hudson v. Pfauter*,[13] where a district court granted the German company's motion for a protective order and required the American plaintiffs to utilize Convention procedures to obtain answers to interrogatories. The court reasoned that the major obstacle to the use of the Convention was unfamiliarity with its procedures and noted that discovery under the Federal Rules was often wasteful.[14]

In the second case, *Knight v. Ford Motor Co.*,[15] a New Jersey state court granted a motion to add Siemens AG, a German corporation, as a defendant and ordered that discovery against Siemens proceed first under the Convention. The court took note that following the *Aerospatiale* Court's decision a Special Commission of the Hague Conference had supported giving the Convention priority over other procedures when evidence located abroad was sought. The Commission also acknowledged that a number of member states had limited their reservations with respect to the discovery of documents.[16] Emphasizing comity and the "special difficulties that may arise for foreign litigants in providing discovery under our U.S. domestic procedures," the court required use of Convention procedures until such time as the proponent of discovery could show that reasonable requests under the Convention were not being met with adequate response in a timely manner. In the Federal Republic's view, this is a minimum that *Aerospatiale* requires.

Cases involving German defendants have constituted a plurality (six out of 14) of the cases weighing the sovereign

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[13]117 F.R.D. 33 (N.D.N.Y. 1987).

[14]*Id.*, at 34, 38.

[15]615 A.2d 297 (N.J. Super. 1992).

[16]*Knight*, at 301 and n. 5.

interest in discovery disputes following *Aerospatiale*. It is fair to say that the sovereign interests of other states have received similar short shrift. See *Benton Graphics v. Uddeholm Corp.*[17] (no showing how a "specific" sovereign interest of Sweden was implicated); *Sandsend Financial Con.v. Wood*[18] (expressing "feeling" that discovery under Convention in Great Britain's Channel Island might be inadequate); *Rich v. Kis California, Inc.*[19] (French blocking statute imposing criminal sanctions entitled to little deference); *In re Bedford Computer Corp.*[20] (only effect of Convention's use in Israel was

[17]118 F.R.D. 386 (D.N.J. 1987). An American company charged that a Swedish specialty steel manufacturer had fraudulently substituted an inferior grade of steel for the steel contractually specified. The court interpreted *Aerospatiale* to place the burden of establishing which discovery procedure to utilize on the party advocating use of the Convention. *Uddeholm, supra*, at 389. Uddeholm's proffer as to Sweden's sovereign interest did not explain how any of the "specific" discovery sought by Benton inplicated any "specific" sovereign interest of Sweden. The court granted Benton's motion compelling responses to interrogatories and document requests pursuant to the Federal Rules. *Id.*, at 389-392.

[18]734 S.W. 2d 364 (Tex. App. 1988). The Texas appellate court denied a writ of mandamus seeking to require use of the Convention to obtain discovery in the Channel Islands of the United Kingdom. The trial court had explained its decision not to use the Convention as follows:

> I read the Supreme Court opinion with care, and there are obviously reasons the Court can feel that discovery needs to be expeditious, I need to go forward and that there might not be viable discovery from other procedures. That's exactly how I feel.

Id., at 366.

[19]121 F.R.D. 254 (M.D.N.C. 1988). The issue in *Rich* was whether a French corporation would be required to answer ten interrogatories relating to personal jurisdiction. The court cited *Aerospatiale*, "96 L.Ed.2d at 486," for the proposition that the proponent of using the Convention's procedures bears the burden of demonstrating the "necessity" for using those procedures, *Rich*, at 257.

[20]114 Bankr. 2 (Bkr.C.D.N.H.1990). There, an Israeli government instrumentality challenged the court's personal jurisdiction over it. The court cited *Rich* and adopted its reasoning. It substantially limited the requested discovery, found that the Israeli instrumentality had not shown that use of the Convention procedures would be "more effective" and that the only effect of using the Convention would be to delay the proceedings, and ordered that Federal Rules discovery be used. *Id.*, at 5-6.

delay); *In re Asbestos Litigation*[21] (Finnish affront at violation of its judicial sovereignty entitle to little weight because discovery under Federal rules more efficient); *Erbach Corp. v. Royal Bank of Canada*[22] (French blocking statute does not demonstrate a significant sovereign interest).

In re Perrier Bottled Water Litigation,[23] is the only non-German case known to us where use of the Convention procedures was ordered. The court found that France's prohibition of foreign discovery on French soil without resort to the Convention signified a strong sovereign interest in the use of the Convention's procedures and that there was no evidence in the record showing that Convention procedures would be ineffective. The court concluded that, should the procedures of the Convention prove unavailing, it would consider modifying its order.[24] — Again, the Federal Republic considers this as a minimum requirement of the Convention.

In the Federal Republic's view, the primary error that leads to the results in these cases is the lower courts' placing the burden of proof to show the sovereign interest on the propo-

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[21]623 A.2d 546 (Del. Super.1992). That case involved review of an Asbestos Master's discovery ruling. Partek, a Finnish corporation, objected to an order to produce documents under the Federal Rules rather than under the Convention on the grounds that the Master had addressed only one of the three factors required by *Aerospatiale* to be considered based on a general statement of Finland's sovereign interest submitted by a former Finnish judge. The court ruled that *Aerospatiale's* three factors constituted neither "minimal requirements" nor "the entire universe of relevant considerations," *Asbestos*, at 549-550, and affirmed the Master's decision as not clearly erroneous.

[22]605 N.Y.S.2d 52 (N.Y.App.Div. 1993). The appellate court, in a three paragraph opinion, affirmed the trial court's order that Banque Paribas produce documents located in France on the grounds that the French blocking statute had not "proved" to be a significant sovereign interest, citing *Rich*, n. 18 *supra*, and that resort to the Convention would frustrate prompt disposition of the matter made necessary by plaintiff's advanced age.

[23]138 F.R.D. 248 (D. Conn. 1991).

[24]*Id.*, at 354-354.

nent of the use of the Convention. *E.g., Uddeholm Corp., supra; Haynes v. Kleinwefers, supra; Scarminach v. Goldwell GmbH, supra; In re Bedford Computer Corp., supra; In re Perrier Bottled Water Litigation, supra; Doster v. Carl Schenk A.G., supra; In re Asbestos Litigation, supra;* and *Erbach Fin. Corp. v. Royal Bank of Canada, supra.* Indeed in *Rich v. Kis California, Inc., supra,* the court demanded that the proponent of the Convention show the "necessity" for its use.[25] *Contra, Knight v. Ford Motor Co.,* (rejecting the "rigorous" requirements of *Uddeholm*).[26]

This approach finds no support in the Convention, and not even in the majority's decision in *Aerospatiale.* The Court there required a *balancing* of factors, including the general sovereign interest, without any mention of the burden of proof. It may be reasonable to require the proponent to show how a *particular* discovery request implicates a sovereign interest of a foreign state, but the *general* sovereign interest should be a matter of judicial notice based on *Aerospatiale*'s teaching and the principle of international comity.[27] There should be no requirement that the foreign state intervene in each case and particularize its sovereign interests. For these reasons, we respectfully submit that *Aerospatiale* should be reconsidered and that lower courts be instructed that the general sovereign interest be specifically addressed and given great weight when a court is ruling on requests for discovery to be taken in a State that is a party to the Convention, and, in addition, that the burden of proof that the Convention be used not be placed on the foreign litigant.

The lower courts' decision in the instant case illustrates the advisability of reconsidering the *Aerospatiale* guidelines. Extraordinarily intrusive discovery designed to probe petitioner's

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[25]615 A.2d, at 258.

[26]*Id.*, at 257.

[27]See the concurring and dissenting opinion of Blackmun, J., in *Aerospatiale,* 482 U.S. at 547.

decision-making process in Germany was authorized to be taken in Germany without judicial intervention. No reference was made in any of the courts' rulings to Germany's general interest in judicial sovereignty or the "sphere of privacy or personal right" (38 BVerfGE, *supra*) that is guaranteed by the German Constitution. Rather, the burden of showing that the procedures of the Convention be used was placed on the petitioner. Germany respectfully submits that the result was inconsistent with the teachings of *Aerospatiale*, and *a fortiori*, with the Convention.

II. THAT THE 1993 AMENDMENTS TO THE FEDERAL RULES WILL ADD TO THE CONFRONTATION BETWEEN THE CIVIL AND COMMON LAW SYSTEMS IS ANOTHER REASON TO FAVOR USE OF THE CONVENTION'S PROCEDURES.

The Court should also note that the 1993 Amendments to the Federal Rules of Civil Procedure are bound to have a substantial impact on discovery against foreign parties. The obligation imposed by new Rule 26(a)(1), Fed.R.Civ.P., to disclose *to the opposing party, without even awaiting a request for discovery,* the names of witnesses and to provide copies of documents relevant to disputed facts, may prove yet another affront to the civil law tradition. In civil law countries, a party is required to disclose the evidentiary materials on which it intends to rely only *to the court*, not to the opposing party, and certainly not without a request.

The 1993 Rule amendments give to the district courts the option to adopt these new amendments in full or in part, or to reject them. Notes of Advisory Committee on Rules, 1993 Amendment to Rule 26, subdivision (a), paragraph (1). As observed by one German commentator, courts in the United States will now differ not only with respect to how and when to apply the *Aerospatiale* guidelines, but also as to whether they should follow the 1993 amendments. This, it is feared, will result

in chaotic forum-shopping to the detriment of foreign litigants. Reimann, *Beyond Fishing-Weitreichende Neuerungen im amerikanischen Discovery-Verfahren* [Extensive Innovations in American Discovery Proceedings], IPRax 1994, No. 2, at 155.

III. *AMICUS* IS OF THE VIEW THAT THE AEROSPATIALE DECISION DOES NOT, IN ANY EVENT, CONFORM TO ACCEPTED PRINCIPLES OF TREATY INTERPRETATION, AND THAT THE COURT'S DECISION SHOULD BE OVERRULED

The Federal Republic subscribes to the original intent of the negotiators of the Convention — an intent shared by the United States negotiators — that "[a]ny system of obtaining evidence or securing the performance of other judicial acts internationally must be 'tolerable' in the State of execution and must also be 'utilizable' in the forum of the State of origin where the action is pending." Message of the President of the United States Transmitting the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, S. Exec. A, 92d Cong., 2d Sess. at 11 (1972). If evidence is requested through the procedures agreed upon in the Convention, the procedure is "tolerable" in the Federal Republic because the evidence will be collected under the auspices of German courts, as mandated by the Federal Republic's domestic legal order. Consequently, where evidence is to be gathered or obtained in the territory of the Federal Republic, the Convention's use will benefit U.S. interests by providing the needed evidence, and will protect the Federal Republic's interests by avoiding intrusions upon its sovereignty. In this regard, the Federal Republic affirms its intent to construe the provisions of the Convention liberally in providing judicial assistance to the United States and the other member states of the Convention.[28]

[28]During the eight-year period from 1986-1993, 1,368 requests for judicial assistance were sent from Germany to the United States; during the same period, United States courts and litigants transmitted 184 requests to the Federal Republic. (Statistical data supplied by the Federal Ministry of Justice.)

One of the principal purposes of the Evidence Convention was to provide a bridge between national legal systems that would permit the production of needed evidence while eliminating intrusions of sovereignty and avoiding intergovernmental conflicts. A violation of the sovereignty of the Federal Republic occurs when a U.S. court compels a party, on pain of potentially severe sanctions, to take actions within the territory of the Federal Republic that violate its sovereignty and other provisions of its Constitution and its laws.

The Federal Republic cannot subscribe to the view that when a party is ordered to produce evidence from abroad, the discovery takes place only in the United States and not in the state where the evidence is located. The theory that judicial jurisdiction over evidence is determined not by the location of the evidence, but by the existence of personal jurisdiction over the party having control over the evidence, is inconsistent with the established German legal order and accepted principles of international law.

It can hardly be disputed that when evidence is sought from the territory of a foreign state for use in a United States court, activities within the foreign state will be required to prepare the evidence for transmission. That is the chief reason that the Convention was negotiated. Documents may need to be searched for, reviewed and photocopied, persons interviewed, and written responses prepared, all within the state where the evidence is sought. The view that the Federal Republic has no interest in activities within its borders preparatory to production of evidence in the United States is irreconcilable with the principle of territorial jurisdiction. As this Court so aptly stated early in its history that —

> *The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.* Any restrictions upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the ex-

> tent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restrictions. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself.

The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116, 136 (1812), emphasis added. Absent resort to the Convention, the Federal Republic considers that the United States lacks "the consent of the [Federal Republic] itself" to compel activities within its borders.

The majority opinion in *Aerospatiale* has effectively abrogated the duties of the United States not only to the Federal Republic, but to all countries that are members of the Convention. The Federal Republic is of the view that under the fundamental rule of ***pacta sunt servanda***, the United States, including its courts, is required to employ the procedures agreed upon in the Convention. To do otherwise is to breach the obligations of the United States as a nation, and risk endangering the viability of the Convention as a whole.

CONCLUSION

The failure by the courts below to order the use of the Convention procedures in obtaining evidence located in the Federal Republic is inconsistent with the obligations assumed by the United States when it ratified the Convention. Accordingly, the Federal Republic urges the Court to grant the instant petition for certiorari and to reexamine the majority's decision in *Aerospatiale* in light of the accumulated evidence that the vast majority of U.S. courts, in reliance on that decision, avoid resorting to the salutary provisions of the Evidence Convention.

Respectfully submitted,

Peter Heidenberger
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OF COUNSEL:
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November 21, 1994

APPENDIX A

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October 3, 1994

Dennis E. Murray, Sr., Esquire
Murray & Murray
300 Central Avenue
Sandusky, Ohio 44871-0019

Re: *In re Rutgersweke AG*, Petition for Certiorari in the Supreme Court

Dear Mr. Murray:

We represent the Federal Republic of Germany which has requested that we file an *amicus* brief supporting the position of Rutgerswerke AG in its petition for certiorari to the Supreme Court. Pursuant to Supreme Court Rule 37, we ask your consent to the filing of such an *amicus* brief.

Sincerely

s/s Peter Heidenberger

Peter Heidenberger

MURRAY & MURRAY
A LEGAL PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW
111 EAST SHORELINE DRIVE
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October 10, 1994

Peter Heidenberger, Esq.
BERLINER, CORCORAN & ROWE
1101 Seventeenth Street, N.W.
Suite 1004
Washington, D.C. 20036-4798

Re: **Rutgerswerke AG, Petition for Certiorari in the Supreme Court**

Dear Mr. Heidenberger:

Our clients decline your invitation to consent to the filing of an *amicus* brief by the Federal Republic of Germany on behalf of Rutgerswerke AG in connection with Rutgerswerke's petition for certiorari to the Supreme Court.

Pursuant to Supreme Court Rule 37.2, consent is refused. If you advise us in writing that your client would like us to articulate the reasons supporting this position, we would be pleased to provide those grounds for your client's consideration and, perhaps, benefit. Please direct all future correspondence to our new address at 111 East Shoreline Drive.

Very truly yours,

MURRAY & MURRAY CO., L.P.A.
s/s
By: Kirk J. Belli Bovi

KJDB:mrf